

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
AUTEX CORPORATION	:	
for Revision of a Determination or for Refund	:	
of Sales and Use Taxes under Articles 28 and 29	:	
of the Tax Law for the Period March 1, 1980	:	
through November 30, 1982.	:	

DETERMINATION

In the Matter of the Petition	:	
of	:	
CHRISTOPHER T. GILLIGAN	:	
OFFICER OF AUTEX CORPORATION	:	
for Revision of a Determination or for Refund	:	
of Sales and Use Taxes under Articles 28 and 29	:	
of the Tax Law for the Period March 1, 1980	:	
through November 30, 1982.	:	

Petitioners, Autex Corporation and Christopher T. Gilligan, as officer, P.O. Box 235, Quogue, New York 11959, filed petitions for revision of determinations or for refunds of sales and use taxes under Articles 28 and 29 of the Tax Law for the period March 1, 1980 through November 30, 1982 (File Nos. 801016 and 801017).

A consolidated hearing was held before Brian L. Friedman, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on July 24, 1987 at 9:15 A.M., with all briefs to be submitted by October 24, 1987. Petitioners appeared by James G. Fouassier, Esq. The Audit Division appeared by John P. Dugan, Esq. (Irwin A. Levy, Esq., of counsel).

ISSUES

I. Whether the Audit Division properly determined additional sales tax due from Autex Corporation for the period at issue.

II. Whether Christopher T. Gilligan was a person required to collect and pay over sales tax on behalf of Autex Corporation within the meaning and intent of Tax Law §§ 1131(1) and 1133(a) for the period at issue.

FINDINGS OF FACT

1. On December 20, 1983, pursuant to a field audit of Autex Corporation, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due to each of the said corporation and to Chris Gilligan, officer of Autex Corporation, in the amount of \$14,982.53, plus penalty and interest, for a total amount due of \$19,988.60 for the period March 1, 1980 through November 30, 1982.¹

2. On January 17, 1983, the corporation, by Chris Gilligan, executed a consent whereby it was agreed that sales and use taxes for the period March 1, 1980 through August 31, 1980 could be determined at any time on or before December 20, 1983.

3. Upon commencement of the audit, a request was made that corporate books and records such as purchase and sales journals, invoices, register tapes, bank records and sales tax returns be provided to the auditors. The only records made available were repair invoices for the month of January 1982. Gasoline purchases for the period March 1, 1980 through August 31, 1982 only were obtained from Mobil Oil Corporation ("Mobil"), the corporation's supplier since, as of September 1, 1982, the law was changed to require that sales tax be paid directly to the gasoline distributor. For said period, gasoline purchases were determined to be \$963,646.36 (excluding the 8¢ per gallon State excise tax). These purchases were marked up by 10 percent to arrive at taxable gasoline sales for the period of \$1,060,011.00.

4. As of September 23, 1982, the business ceased operations and the station became vacant. For the period March 1, 1980 through September 23, 1982, the auditors obtained from Mobil the corporation's purchases of oil and other fluids which amounted to \$8,242.00. These

¹It should be noted that although the full name of the petitioner/officer of Autex Corporation is Christopher T. Gilligan, the Notice of Determination and Demand was issued by the Audit Division to Chris Gilligan.

purchases were marked up by 80 percent to arrive at taxable oil and fluid sales of \$14,835.60.

5. The repair sales invoices for January 1982 which were provided by the corporation to the auditors indicated that such sales were in the amount of \$10,094.52. Mr. Gilligan stated to the auditors that during the months of June, July and August, repair sales were approximately twice that of winter months. The total months for the audit period (31) were, therefore, increased by 9 to account for this increase during the summers within the period. By multiplying the January 1982 repair sales of \$10,094.52 by 40 (31 + 9), taxable repair sales for the audit period were determined to be \$403,780.80. Audited taxable sales for the audit period were, therefore, determined to be \$1,478,627.40 (\$1,060,011.00 gasoline + \$14,835.60 oil and fluids + \$403,780.80 repairs). Reported taxable sales for the period were \$1,270,332.00. For the last two sales tax quarters of the audit period, i.e., the quarters ended August 31, 1982 and November 30, 1982, sales tax returns were not filed and payments of tax were not made. Additional sales tax due for the audit period was \$14,982.53 (\$10,915.38 of which was due for the sales tax quarters in which no returns were filed).

6. Autex Corporation was formed by Christopher T. Gilligan in 1979. At the time of incorporation, he was the sole officer and shareholder. In February 1980, Autex Corporation purchased a gasoline station and repair shop known as Hampton Imports from Hampton Imports, Inc. After the purchase of Hampton Imports by Autex Corporation, Bruce Sheehy and Robert Woods, who were employees prior to said purchase, continued to work at the station.

7. In May 1981, Mr. Gilligan and Mr. Sheehy entered into an agreement whereby Mr. Sheehy was to purchase 50 percent of the stock of Autex Corporation for \$25,000.00. The shares were subsequently issued to Mr. Sheehy, although he never paid the sum agreed upon. Mr. Sheehy became the vice-president of Autex Corporation and, along with Mr. Gilligan, became a signatory of the corporate checking account. In the early part of 1982, Mr. Gilligan and Mr. Sheehy began to have serious disagreements concerning the operation of the business. In March 1982, Robert Woods took over as manager of Hampton Imports pursuant to the direction of Mr. Sheehy although Mr. Gilligan continued to work at the station. In June 1982, Mr. Gilligan

stopped going to work at Hampton Imports. At approximately the same time, Bruce Sheehy commenced an action in the Supreme Court of Suffolk County to dissolve the corporation. Mr. Gilligan moved to dismiss the proceeding on the basis that Mr. Sheehy was not a 50 percent shareholder. A hearing was held wherein it was determined that Mr. Gilligan did not establish that Bruce Sheehy was not a 50 percent shareholder. The court, on June 28, 1982, ordered that Autex Corporation could no longer expend corporate funds and that it must cease doing business.

8. On July 15, 1982, after Autex Corporation was ordered to cease doing business and expending funds, the corporation, by Christopher T. Gilligan, president, entered into an agreement with Ralph Licursi whereby it was agreed that Mr. Licursi would operate the gasoline filling portion of the business as a subcontractor. Pursuant to this agreement, Mr. Licursi was to continue to purchase gasoline from Mobil and, after deduction of the cost of the gasoline, labor and certain other costs plus \$500.00, was to equally divide the remaining profit with the corporation. The purpose of this agreement was to allow the station to continue to operate and to make purchases from Mobil so that Mobil would not terminate its agreement to sell to Hampton Imports. Mr. Licursi continued to operate the gasoline filling portion of the business until September 15, 1982, at which time Bruce Sheehy terminated the agreement and evicted him from the premises. Mr. Licursi did not fully comply with the provisions of the agreement, i.e., the corporation did not receive 50 percent of the income from the gasoline filling business.

9. For the period at issue, all sales tax returns filed by Autex Corporation were signed by Christopher T. Gilligan with the exception of the returns for the quarters ending November 30, 1980 and February 28, 1982 which were signed by Tamara Bobb, secretary. All filed returns were timely and sales taxes due thereon were paid.

10. After entry of the court order which prohibited Autex Corporation from doing business and expending corporate funds, Ralph Licursi, pursuant to the agreement entered into on July 15, 1982, operated the gasoline filling portion of the business and Bruce Sheehy operated the automobile repair business using his own personal funds. After June 1982, Christopher T. Gilligan no longer went to work at the station, stopped receiving a salary or other income from

the business and remained unemployed for the duration of the audit period. Autex Corporation was never formally dissolved.

11. For the quarter June 1, 1982 through August 31, 1982, the Audit Division, through the use of its third party verification from Mobil, determined that Autex Corporation had taxable gasoline sales of \$77,011.31 and oil and other fluid sales of \$2,163.01. Using the formula as set forth in Finding of Fact "5", supra, repair sales for the quarter were \$60,567.12. Total taxable sales for this quarter were, therefore, determined to be \$139,741.44. Total additional tax was found to be due in the amount of \$10,131.25.

CONCLUSIONS OF LAW

A. That Tax Law § 1135(a) requires every person required to collect sales tax to keep records of every sale and of the tax payable thereon. "Such records shall include a true copy of each sales slip, invoice, receipt, statement or memorandum" (Tax Law § 1135[a]). Tax Law § 1138(a) provides that if a sales tax return "is not filed, or if a return when filed is incorrect or insufficient, the amount of tax due shall be determined by the tax commission from such information as may be available. If necessary, the tax may be estimated on the basis of external indices...." "When records are not provided or are incomplete and insufficient, it is [the Tax Commission's] duty to select a method reasonably calculated to reflect the taxes due.... The burden then rests upon the taxpayer to demonstrate...that the method of audit or the amount of the tax assessed was erroneous" (Surface Line Operators Fraternal Organization, Inc. v. Tully, 85 AD2d 858 [citations omitted]). Petitioner Autex Corporation has not demonstrated that either the method employed by the Audit Division or the amount of tax assessed was erroneous.

B. That Tax Law § 1133(a) provides, in part, that every person required to collect the taxes imposed under Article 28 of the Tax Law is also personally liable for the tax imposed, collected, or required to be collected under such law. Tax Law § 1131(1) defines "(p)ersons required to collect tax", as used in Tax Law § 1133(a), to include any officer or employee of a corporation, or a dissolved corporation who, as such officer or employee, is under a duty to act for the corporation in complying with any requirement of Article 28 of the Tax Law.

C. That the determination of whether an individual is a person or officer under a duty to act for the corporation is based upon the facts presented (Vogel v. New York State Department of Taxation and Finance, 98 Misc2d 222). The relevant factors include, but are not limited to: the individual's daily involvement in the corporation; the individual's participation and involvement in the financial affairs of the corporation; whether the individual prepared and signed the sales and use tax returns; the individual's authority to draft checks on the firm's bank account; and, in the case of a closely-held corporation, the individual's knowledge of the affairs of the firm and benefits from the firm's profits (Matter of Robert Gattie, State Tax Commission, September 5, 1980).

D. That, based upon the criteria set forth in Conclusion of Law "C", petitioner Christopher T. Gilligan was a person under a duty to collect sales and use taxes for Autex Corporation for the period March 1, 1980 through June 30, 1982. This determination is based upon the facts that, for said period, petitioner was involved in the day-to-day operations of Hampton Imports, signed sales tax returns, had check-signing authority and received salary and/or profits from the corporation.

E. That, after June 30, 1982, petitioner Christopher T. Gilligan was not a person under a duty to collect sales and use taxes for Autex Corporation. After entry of the court order which prohibited Autex Corporation from doing business or expending funds, Mr. Gilligan was no longer involved in the day-to-day operations of Hampton Imports, i.e., Ralph Licursi operated and received the income from the gasoline filling business and Bruce Sheehy and Robert Woods operated and received the income from the automobile repair portion of the business. Mr. Gilligan no longer prepared and signed sales tax returns, had access to corporate funds or received income from the corporation. Since repair sales for the quarter June 1, 1982 through August 31, 1982 were \$60,567.12 (see ___ Finding of Fact "11"), he was responsible for collection of sales tax on repair sales of \$20,189.04 (1/3 of \$60,567.12). With respect to sales of gasoline, oil and other fluids, since Ralph Licursi took over such sales on July 15, 1982, Mr. Gilligan is responsible for collection of sales tax on such sales only for the month of June

1982. As indicated in Finding of Fact "11", taxable gasoline sales for the quarter amounted to \$77,011.31 and sales of oil and other fluids were \$2,163.01. Petitioner Christopher T. Gilligan is, therefore, responsible for the collection of sales taxes on \$26,391.44 (1/3 of \$77,011.31 + \$2,163.01).

F. That for the sales tax quarter September 1, 1982 through November 30, 1982, petitioner Christopher T. Gilligan was not a person under a duty to collect sales and use taxes for Autex Corporation.

G. That penalties imposed against Autex Corporation pursuant to Tax Law § 1145(a)(1) and (2) for failure to file returns and for failure to pay or pay over sales tax for the quarters ended August 31, 1982 and November 30, 1982 are sustained. As to petitioner Christopher T. Gilligan, such penalties are sustained for the month of June 1982 (1/3 of \$1,924.95 = \$641.65) and are cancelled for the balance of the quarter ended August 31, 1982 and for the entire quarter ended November 30, 1982.

H. That the petition of Autex Corporation is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued December 20, 1983 is hereby sustained.

I. That the petition of Christopher T. Gilligan, officer of Autex Corporation, is granted to the extent indicated in Conclusions of Law "D", "E", "F" and "G"; the Audit Division is hereby directed to modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued to said petitioner on December 20, 1983; and that, except as so granted, the petition is in all other respects denied.

DATED: Albany, New York
January 28, 1988

ADMINISTRATIVE LAW JUDGE